Editor's note: Appealed -- aff'd, Civ.No. 87-140-GF-PGH (D.Mont. Feb. 8, 1989).

UNITED STATES
v.
NORMAN A. WHITTAKER (ON RECONSIDERATION)

IBLA 85-67; 95 IBLA 271 (1987) Decided May 3, 1988

Petition for reconsideration of a decision dismissing a contest against the Iron King N lode mining claim and declaring the Fault lode mining claim null and void.

Petition denied; prior decision reaffirmed.

1. Rules of Practice: Appeals: Reconsideration

   Under 43 CFR 4.21(c), a request for reconsideration of a decision of the Board of Land Appeals was required to be filed promptly and could only be granted in extraordinary circumstances. A petition filed more than 6 months after issuance of a decision will be denied as untimely in the absence of a showing of justification for the delay in filing.

2. Mining Claims: Discovery: Marketability--Mining Claims: Patent

   Where a mineral patent application has been filed and the mineral claimant has tendered the full purchase price for the claim, a subsequent inquiry as to whether a discovery of a valuable mineral deposit has been shown to exist is properly directed to whether or not the discovery was established by the date of the entry, i.e., no later than the date of issuance of final certificate.

APPEARANCES: Sally Thane Christensen, Esq., Office of the General Counsel, United States Department of Agriculture, Missoula, Montana, for petitioner U.S. Forest Service; Turner C. Graybill, Esq., Great Falls, Montana, for respondent Norman A. Whittaker.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision of January 29, 1987, styled United States v. Whittaker, 95 IBLA 271 (1987), this Board affirmed the decision of Administrative Law Judge Michael L. Morehouse to the extent that he had dismissed the contest

complaint against the Iron King N lode mining claim but reversed the decision to the extent that Judge Morehouse had dismissed a contest against the Fault lode mining claim, finding that the evidence failed to establish that the Fault lode claim was supported by a discovery of a valuable mineral deposit. Accordingly, we held that latter claim null and void.

On August 20, 1987, over 6 months after this Board's decision was rendered, counsel for the United States Forest Service (Forest Service) filed a petition for reconsideration of that decision to the extent that
it had dismissed the contest complaint against the Iron King N lode mining claim. Subsequent thereto, counsel for the claimant submitted a brief in opposition to the petition. For reasons set forth below, we hereby deny the petition and reaffirm our original decision.

[1] Initially, we note that the petition is not timely. The regulation applicable when this Board originally rendered its decision, 43 CFR 4.21(c), provided:

> No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies.

Thus, under the regulation then applicable, 1/ a petition for reconsideration could only be granted where there were extraordinary circumstances justifying such action. Moreover, the regulation expressly required that such a petition be filed "promptly."

In Pathfinder Mines Corp. (On Reconsideration), 76 IBLA 276 (1983), this Board considered a petition that had been filed more than 6 months after the decision in question. Therein, we noted:

1/ Subsequent to our decision in the instant case, the Board amended its regulations to specifically provide that a petition for reconsideration must be filed within 60 days after the issuance of a decision. See 43 CFR 4.403, 52 FR 21308 (June 5, 1987). We expressly held in Fletcher De Fisher (On Reconsideration), 101 IBLA 212 (1988), that all petitions for reconsideration of decisions rendered prior to July 6, 1987, the effective date of the regulation, must be filed on or before Sept. 7, 1987.

> Even a promptly filed petition will be denied if the petitioner merely renews arguments made in the original appeal and fails to demonstrate extraordinary circumstances. When a petition is filed more than 6 months after the Board has issued its decision, some additional explanation is required in order to provide the Board with some basis for finding that the petition meets the regulatory requirement for promptness. At a minimum, the petitioner should be required to explain why the petition could not have been filed earlier.

Id. at 277.

Petitioner, herein, premises its motion on the completion of a new mar-ket survey which it contends reveals that there is no market or potential market for magnetite as a coal cleaning agent. Thus, petitioner contends:

> [I]naccurate evidence was presented at the contest hearing regarding the potential development of a market for magnetite as a coal cleaning agent resulting from expanding coal production in Montana and the West. In addition, new evidence indicates that the present western market for magnetite as a coal cleaning agent is extremely limited.

Petition for Reconsideration at 2-3.

We note that the documents submitted with the petition do not provide any explanation as to why the petition was filed more than 6 months after our decision. A review of the market study which petitioner has provided
to the Board discloses that it was conducted from July 8 to August 11, 1987. Petitioner, therefore, did not even commence preparation of its study until 5 months after the Board's decision.

Leaving aside the failure of petitioner to justify the tardy nature
of its motion, to the extent that the petition is premised on new evidence which it now seeks to have considered, the Board precedents are clear. It has been the consistent rule in the Department that evidence may only be submitted on appeal for the limited purpose of ascertaining whether a new hearing should be ordered. See United States v. Mattox, 36 IBLA 171 (1978); United States v. Kottinger, 14 IBLA 10 (1973); United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971); United States v. Lutey, 76 I.D. 37 (1969); United States v. Benson, A-31061 (Sept. 4, 1969); United States v. Wedertz, 71 I.D. 368 (1964); United States v. Capt, A-27749 (Dec. 17, 1958). Moreover, since the entire purpose of granting fact-finding hearings is to develop an evidentiary record, a party submitting evidence after a hearing must not only show a compelling reason to use evidence which was not tendered at the hearing (see United States v. Reynders, 26 IBLA 131 (1976)), it must also justify its failure to submit the evidence at the first hearing. See United States v. Holder, 100 IBLA 146, 148-49 (1987); United States v. Whitney, 51 IBLA 73, 88 (1980); United States v. Syndbad, 42 IBLA 313, 322 (1979); United States v. Hanson, 26 IBLA 300 (1976).

The foregoing principles have an even greater relevancy where a party seeks to introduce new evidence after completion of Board adjudication. In the instant case, whether or not a market existed for the magnetite deposit was a key point in controversy. Thus, if petitioner had desired to supplement its evidentiary arsenal by completing a more in-depth market analysis than that which it presented, it had more than ample opportunity in the six years which elapsed between issuance of final certificate and commencement of the hearing to develop such a detailed analysis. No explanation has been provided as to why this endeavor was not attempted at an earlier date.

[2] Moreover, to the extent that the market study is directed to an analysis of the market conditions which now exist, we must conclude that
it is irrelevant to the issues properly considered in the context of this appeal. In our prior decision, we briefly adverted to an issue which the contestee had raised but which we felt was unnecessary to decide: namely, whether the contestee was required to show marketability of the deposit as of the time of the issuance of the final certificate or as of the time of hearing. We noted:

> This question usually does not arise because of the close proximity that normally obtains between issuance of the final certificate and commencement of the contest. In the instant case, the inordinate delay in filing the complaint engendered a concern that a different substantive result might obtain depending upon the specific period of time at which present marketability might be judged. But see In re Pacific Coast Molybdenum, [75 IBLA 16, 90 I.D. 352 (1983)]. This issue, however, is not critical to our determinations with respect to either claim, since we found that a discovery has existed on the Iron King N at all critical points and that no deposit of iron ore has ever been disclosed within the limits of the Fault claim. Accordingly, we decline to rule on this question beyond noting that we view it as one involving complexities which are not easily resolved.

95 IBLA at 290 n.16. In light of the petitioner's submission, it is clear that we must now face the issue which we avoided in our original decision.

It has long since been recognized that mining claims, properly located and supported by a discovery, "are property in the fullest sense of the word." Forbes v. Gracey, 94 U.S. 762, 767 (1877). The location of a valid claim gives the mineral claimant "the exclusive right of possession and enjoyment of all the surface included within the lines of [the] location." 30 U.S.C. | 26 (1982). The mere location of such a claim, however, without more, does not give to the claimant any equitable or legal title to the land within the location. Those titles vest only upon payment of the purchase price established by Congress for the land. See Black v. Elkhorn Mining Co., 163 U.S. 445, 450 (1896); Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 430 (1892); United States v. Rizzinelli, 182 F. 675, 682-83 (D. Idaho 1910). Therefore, to the extent that the Gov- ernment retains equitable title the Government similarly retains plenary authority to examine claims to its land, and may even reexamine those claims

which had earlier been determined to be valid so as to ensure that they have continued to remain so.

The instant case, however, presents a different fact situation. In this case, the mining claimant tendered payment and received the final cer- tificate therefor on February 14, 1977. Assuming that a discovery within the contemplation of the mining laws then existed, equitable title passed to the claimant and the Government held only the bare legal title. Issuance of a mineral patent could, in such circumstances, be compelled by mandamus. Wilbur v. Krushnic, 280 U.S. 306 (1930).

It is, of course, well recognized that issuance of the final certificate does not present a bar to consideration by the Department as to whether or not a discovery did, in fact, exist. Cameron v. United States, 252 U.S. 450, 460 (1920). But, the question which this case poses concerns the point in time to which an inquiry should be directed. Based on our review of the applicable judicial precedents, we have concluded that, as a general matter, where a patent application is involved and final certificate has issued, the question of present marketability must be determined by reference to the date on which the claimant fulfilled all of the prerequisites to the making of the entry, i.e., no later than the date of the issuance of the final certificate.

Thus, in Cameron v. United States, supra, wherein the Supreme Court clearly established the authority of the United States to adjudicate the validity of mining claims even in the absence of a third-party interest, the Court quoted with approval from the decision in Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 593 (1897):

> It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. [Emphasis supplied.]

Id. at 461.

Of similar purport is the decision in Teller v. United States, 113 F. 273 (8th Cir. 1901). Therein, the Court noted:

> After the locator shall have applied for a patent, in the event in the exercise of his option he sees fit to do so, and after he shall have fully perfected his entry upon the land by the payment of the purchase price, and not till then, has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. * * * When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him. [Emphasis supplied; citation omitted.]

Id. at 281-82.

It may be seen from the foregoing that, where the United States contests the validity of a mining claim after issuance of final certificate it is, in fact, determining whether or not equitable title has already passed upon payment of the purchase price. It thus necessarily follows that consideration of whether or not a claimed deposit was marketable at a profit must focus on that date and not on some subsequent date, e.g., the date of hearing.

It must, of course, be recognized that, as a practical matter, which of these two dates is used would, in the vast majority of cases, be a matter of little moment. Normally, a hearing as to a mining claim's validity will follow hard upon the filing of the patent application documents. And, we have noted elsewhere that

> "[p]resent marketability" has never encompassed the examination of either cost or price factors as of a specific, finite moment of time, without reference to other economic factors. Rather, the question of whether something is "presently marketable at a profit" simply means that a mining claimant must show that, as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likeli- hood of success that a paying mine can be developed.

In re Pacific Coast Molybdenum, supra at 29, 90 I.D. at 360. But, as the time gap between the perfection of the entry and the onset of the hearing expands, the possibility increases that dramatic changes in either the mar- ket or in the conditions of the mining claim itself could lead to differing results depending upon what point in time present marketability is examined.

So it may be in the present case. Petitioner has now generated a mar- ketability study which purports to show that, as a present fact, the magne- tite from the Iron King N could not be marketed at a profit. Ten years, however, have now elapsed since appellant received the final certificate. We have certainly reached the point in time where we can no longer be jus-tified in assuming that the present market mirrors the market which was in existence when the patent application was filed. And, insofar as that lat- ter market is concerned, we note that, in its decision, this Board fully considered the evidence presented at the hearing, most of which went to precisely this question. We noted:

> Essentially, the crux of the marketability question in the instant case revolves around a conflict in testimony. The Forest Service presented the testimony of Newman and Hays, both of whom qualified as experts, that the magnetite ore on the Iron King N claim did not constitute a valuable mineral deposit because of the inadequacy of the reserves and the distance from any relevant market. Contestee presented evidence both of past sales (admittedly of relatively small amounts) as well as present and future markets. Judge Morehouse, who had an opportunity to observe the various witnesses and ascertain their credibility, clearly was persuaded that appellee's evidence was believable. * * * In light

> of Judge Morehouse's implicit credibility findings and in the absence of any compelling evidence or legal considerations which might justify us in overruling his determination on this point, the Board affirms his decision insofar as the Iron King N is concerned.

95 IBLA at 286. Even if this petition arose without any of the procedural infirmities outlined above, we would find no basis for altering our original conclusion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for recon-sideration is denied and the decision of the Board, reported at 95 IBLA 271, is reaffirmed.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge